'The Santorini I'; Owners of Cargo carried in the Ship 'Santorini I' v Owners of the Ship and Other Persons Interested in the Ship 'Santorini I'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO D3–27–28–94
VC GEORGE J
30 SEPTEMBER 1994

Shipping and Navigation *— Action in rem — Arrest of vessel — Discharge of warrant of arrest — Breach of contract of carriage on owner's part by releasing cargo without bill of lading — Failure of negotiations with purchasers for payment — Whether proper defendant was purchaser of goods or owner of ship — Whether negotiations had to be disclosed when applying for warrant of arrest — Rules of the High Court 1980 O 70 r 4*

The plaintiffs sold 15,741 metric tons of coke ('the cargo') to Thyssen-Agipcoal GmbH of Germany ('Thyssen'). The cargo was loaded on the 'Santorini I' ('the ship') at Xingang, China under a bill of lading. Payment was to be made by a letter of credit opened by Thyssen with its bank at Dusseldorf. The owners of the ship ('the defendant') had chartered the ship to Thyssen. Upon the ship's arrival in Holland, RTE, a third party to whom Thyssen had sold the cargo, persuaded the master of the ship to release the goods without a bill of lading. Thereafter, it purported to reject the cargo. Negotiations between the plaintiffs and RTE or Thyssen broke down and the plaintiffs' efforts to locate the cargo failed. The plaintiffs brought an action in rem against the defendant and obtained a warrant for the ship's arrest under O 70 r 4 of the Rules of the High Court 1980. The defendant contended that the plaintiffs' claim against it was misconceived as its claim was in personam against RTE and/or Thyssen and the warrant of arrest should be set aside on the ground, inter alia, that the plaintiff had failed to disclose certain material facts, eg the negotiations with RTE or Thyssen, which entitled the defendant to set aside the warrant.

Held, dismissing the defendant's application:

(1) The fact that the plaintiffs had negotiated with RTE and/or Thyssen for payment did not per se extinguish the plaintiffs' rights in rem vis-a-vis the defendant. Delivery of the cargo without the bill of lading was a breach of the contract of carriage between the plaintiffs and defendant and the attempt to mitigate the loss did not act as a waiver of rights. The contract of carriage between the plaintiffs and the defendant, as owners of the ship, was separate and distinct from the sale contract with Thyssen.

(2) Order 70 r 4 specifies what has to be disclosed to the court in support of the praecipe for a warrant of arrest of a ship. However, the non-disclosure of the fact that there were negotiations and attempts to mitigate the damage were not material to the issue of a warrant of arrest.

Obiter:

If the defendant succeeds in showing that the cargo was released to the true owner, no damages would be recoverable.

[Bahasa Malaysia summary

Plaintif telah menjual 15,741 tan metrik kok ('kargo itu') kepada Thyssen-Agipcoal GmbH di negeri Jerman ('Thyssen'). Kargo itu telah dimuatkan ke atas 'Santorini I' ('kapal itu') di Xingang, China di bawah suatu bil muatan. Bayaran seharusnya dibuat melalui surat kredit yang dibuka oleh Thyssen dengan banknya di Dusseldorf. Pemunya kapal itu ('defendan itu') telah mencarter kapal itu kepada Thyssen. Apabila kapal itu sampai di negera Belanda, RTE, suatu pihak ketiga kepada mana Thyssen telah menjual kargo itu, telah memujuk ketua kapal itu untuk melepaskan barangan itu tanpa suatu bil muatan. Kemudiannya, ia kononnya telah menolak kargo itu. Perundingan di antara plaintif dan RTE atau Thyssen telah gagal dan usaha plaintif untuk mencari kargo itu juga gagal. Plaintif telah membawa suatu tindakan in rem terhadap defendan dan mendapatkan suatu waran penahanan kapal itu di bawah A 70 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan menegaskan bahawa tuntutan plaintif terhadapnya disalah tanggap kerana tuntutannya adalah in personam terhadap RTE dan/atau Thyssen dan waran penahanan itu sepatutnya diketepikan atas dasar, antara lain, bahawa plaintif telah gagal mendedahkan beberapa fakta penting, misalnya perundingan dengan RTE atau Thyssen, yang memberi hak kepada defendan untuk mengetepikan waran itu.

Diputuskan, menolak permohonan defendan:

(1) Hakikat bahawa plaintif telah berunding dengan RTE dan/atau Thyssen untuk pembayaran tidak secara per se melenyapkan hak plaintif terhadap defendan. Penghantaran kargo itu tanpa bil muatan adalah suatu kemungkiran kontrak pengangkutan di antara plaintif dan defendan dan percubaan untuk mengurangkan kerugian itu tidak bertindak sebagai suatu penepian hak. Kontrak pengangkutan di antara plaintif dan defendan, sebagai pemunya kapal itu, berasingan dan berbeza daripada kontrak jualan dengan Thyssen.

(2) Aturan 70 k 4 menetapkan apa yang mesti didedahkan kepada mahkamah untuk menyokong praecipe bagi waran penahanan kapal itu. Bagaimanapun, ketakdedahan fakta bahawa terdapat perundingan dan percubaan untuk mengurangkan kerugian itu tidak penting kepada pengeluaran waran penahanan itu.

Obiter:

Jika defendan berjaya menunjukkan bahawa kargo itu telah dilepaskan kepada pemunyanya yang sebenar, ganti rugi tidak boleh didapatkan.]

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No W–02–180–94.]

A **Notes**

For cases on arrest of vessels, see 11 *Mallal's Digest* (4th Ed) paras 691–823; [1989] Mallal's Digest 1446–1449; [1991] Mallal's Digest 1868–1869; [1992] Mallal's Digest 1591–1593; [1993] Mallal's Digest 1235–1237.

B **Cases referred to**

Kuwait Petroleum Corp v I & D Oil Carriers Ltd (Court of Appeal, 21 July 1994) (unreported) (refd)

'The Vasso' [1984] QB 477; [1984] 1 All ER 1126; [1984] 2 WLR 570; [1984] 1 Lloyd's Rep 235 (folld)

C **Legislation referred to**

Courts of Judicature Act 1964 s 24(b)
Rules of the High Court 1980 O 70 r 4
Rules of the Supreme Court O 75 r 5(1) [Eng]
D Supreme Court Act 1981 s 20(2)(g), (h) [UK]

Joyrama Appusamy (*Shearn Delamore & Co*) for the plaintiffs.
M David Morais (*M David Morais*) for the defendant.

E *Cur Adv Vult*

VC George J: This is an application to set aside the warrant of arrest of the ship 'Santorini I'.

The admiralty jurisdiction of the High Court stems from s 24(b) of the Courts of Judicature Act 1964 which provides that the civil jurisdiction F of the court shall include the same jurisdiction and authority in relation to matters of admiralty as is heard by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981, s 20 of which, inter alia, provides that the admiralty jurisdiction of the court shall include the jurisdiction to hear and determine any of the questions and claims G mentioned in sub-s 2 of the section which includes any claim for loss of or damage to goods carried in a ship and any claim arising out of any agreement relating to the carriage of goods in a ship (s 20(2)(g) and (h)).

The rules pertaining to the admiralty jurisdiction of the court is in O 70 of the Rules of the High Court 1980. Rule 4 thereof provides that a H warrant for the arrest of a ship may be issued after a writ has been issued in an action in rem. The prescribed praecipe requesting the issue of a warrant is to be accompanied by an affidavit containing the particulars required by paras (6), (7) and (8) of r 4.

What is required by the rules, in the context of the facts of the instant case, to be in the affidavit in support of a warrant of arrest to issue, include I particulars of the applicant and of the nature of his claim, whether the ship is the ship in connection with which the claim in the action arose and that the person who would be liable on the claim in an action in personam is the owner or charterer or in possession or control of the ship and at the time the writ issued was the beneficial owner of all the shares in the ship. The grounds for such belief has to be disclosed.

It was urged on the court that the policy of O 70 r 4 is that the merits of the claim need not be gone into at this interlocutory stage. Some confirmation of this was said to be provided by the outline form of affidavit in support of the praecipe suggested by 1 *Supreme Court Practice 1991* at para 75/5/9.

In *'The Vasso'* [1984] QB 477 at p 489; [1984] 1 All ER 1126 at pp 1133–1134; [1984] 2 WLR 570 at p 578; [1984] 1 Lloyd's Rep 235 at p 241, Robert Goff LJ says with reference to a rule equipolant to our O 70 r 4(1) (English O 75 r 5(1)):

> This rule reflects the simple fact that, subject to the filing of the necessary praecipe and affidavit, the only prerequisite to the court's jurisdiction to issue a warrant for arrest is that a writ must have been issued in an action in rem. So, provided that a writ is issued upon which there is endorsed a claim falling within one of those lettered sub-paras of s 1(1) of the 1956 Act (now s 20(2) of the 1981 Act) which are specified in s 3(4) of the 1956 Act (now s 21(4) of the 1981 Act) as justifying the invocation of the admiralty jurisdiction by an action in rem, the court, in our judgment, has jurisdiction to issue a warrant for the arrest of the relevant ship, and to execute that warrant, the exercise of that jurisdiction being regulated by the relevant rules in O 75.
>
> In our judgment, the purpose of the plaintiff in invoking the admiralty jurisdiction cannot affect the existence of the jurisdiction. The jurisdiction is simply there. The court has the power to arrest. But the exercise of the power is, as O 75 r 5(1) shows, not mandatory; the court may decline to exercise it. Furthermore, under r 13(4) of O 75,the court has a discretionary power to order the release of property under arrest. The court's decision whether to exercise either of those powers may be affected by the manner in which, or the purpose for which, the plaintiff has proceeded.

It is not contended by the application that in seeking the warrant of arrest the plaintiffs had not met the requirements of O 70 r 4. One of the complaints is that on the facts of the instant case, the plaintiffs should have disclosed certain other facts which they say are material facts, the non-disclosure of which entitles them to have the warrant of arrest discharged.

The plaintiffs are shippers of a cargo of 15,741 metric tons ('mt') of coke which was loaded on the 'Santorini I' at Xingang, China under a bill of lading dated 6 October 1993. The plaintiffs had sold the coke to Thyssen-Agipcoal GmbH of Germany ('Thyssen'). Payment was to be made by a letter of credit ('LC') which was opened by Thyssen at its bank, Trinkhaus and Burkhardt of Dusseldorf. The owners of the vessel had, by a voyage charterparty, chartered the ship to Thyssen to carry a cargo of coke (part of which was to be the said 15,741mt) from Xingang. The loading of the 15,741mt of coke was completed at Xingang on 6 October 1993. The aggregate weight of coke loaded on to the vessel was 27,954 mt. The extra 12,213mt had been loaded earlier, on 2 October 1993. By the terms of the charterparty, Thyssen had the conduct of the performance of the voyage. In fact, when the voyage commenced, the plaintiffs did not know at which port in Europe the coke was to be discharged. Eventually it was said to have been discharged at Flushing in Holland on 18 or 19 November 1993 on the instructions of Thyssen.

A It was in the contemplation of the parties that Thyssen may sell the coke to a third party. The consignee or any such third party was expected to honour the LC which was an 'on sight' LC by effecting payment to be made at the Trinkhaus and Burkhardt Bank in Dusseldorf which would result in the shipping documents, including the bill of lading, being given to the payor who would then be able to present it to the master of the B vessel at the port of discharge and, on the basis of such presentation, the master would have released the cargo to the holder of the bill of lading.

The shipping documents, including the bill of lading, arrived at the Dusseldorf bank in good time on or before 2 November 1993 and Thyssen was informed of this. But they apparently alleged certain irregularities in C respect of the documents and rejected the documents. Apparently, they were not prepared to waive the irregularities. However it would appear that although in effect they had not completed the purchase of the coke in that they had refused to negotiate the LC, they purported to sell this coke to a third party (who turned out to be a subsidiary of theirs, referred to as D 'RTE') on or about 5 November 1993 and appear to have misrepresented to the master of the vessel when it arrived at Flushing on or about 18 November 1993, that the bill of lading had not arrived and had persuaded him to release the coke to RTE against a letter of indemnity provided by Thyssen.

E Thereafter, RTE, on or about 23 November 1993, purported to reject the cargo, apparently on the basis of an analysis of the cargo at Flushing. In the evidence provided by the defendant to the court in respect of this analysis, there appears to be a deliberate (and if I may say so, stupid) attempt to blank out certain figures from the report of the analysis which figures, if disclosed, it would seem would have shown that the F analysis carried out at Flushing was not of the 15,741mt but of the whole 27,954mt of coke and as such could prove to be useless to support the contention that the 15,741mt did not meet the specifications.

In rejecting the cargo, RTE had informed the plaintiffs by telefax that the 15,741mt of coke 'is for your immediate disposal in Flushing' and G that the LC would not be negotiated.

Thereafter, there was a serious attempt to negotiate a new price for the cargo between the plaintiffs and RTE or Thyssen and when that failed, attempts were made to locate the cargo by the plaintiffs and/or their agent but it or most of it apparently could not be located.

H For the defendant, it is contended that in the circumstances, the only claim the plaintiffs have is in personam against RTE and/or Thyssen; that the claim on the owner of the vessel is misconceived; that the warrant of arrest should be set aside or be discharged and consequential orders be made.

I In my judgment, that the plaintiffs had negotiated with RTE and/or Thyssen for payment does not per se have the effect of doing away with the rights in rem that the plaintiffs have vis-a-vis the owners of the vessel. What in effect was an attempt to mitigate the loss arising from the breach of the arrangement on the part of the master of the vessel (releasing the

cargo without the production of the bill of lading) does not have the effect of a waiver of rights.

The contract of affreightment or carriage between the plaintiffs and the owner of the vessel is separate and distinct from the sale contract with Thyssen.

As has been seen, O 70 r 4 specifies what has to be disclosed to the court in support of the praecipe for a warrant of arrest of a ship. No doubt other material information should also be provided. However the non-disclosure of the fact that there were those negotiations, that there were attempts to mitigate the damage, are not, in my judgment, material to the issue of a warrant of arrest.

It is conceded that delivery of the cargo without production of the bill of lading was in breach of the contract of carriage. However it is contended that delivery to the person entitled is good delivery even though the bill of lading was not produced. RTE, they say, was the person entitled. The basis of saying that is Thyssen saying so and RTE confirming it. That I do not think is good enough. However, and in any event, I do not think anything turns on that vis-a-vis the issue of the warrant of arrest or the application to set aside. In the unreported judgment of the English Court of Appeal in *Kuwait Petroleum Corp v I & D Oil Carriers Ltd* that was handed down on 21 July 1994, Neill LJ speaking for the court said at p 39 of the draft judgment:

> I can see no good reason to depart from the general rule that the owners do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. Of course if such a delivery is made and the person to whom the cargo is delivered proves to be the true owner, no damages would be recoverable. In this context, it is helpful to draw attention to the speech of Lord Blackburn in *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591 at p 610:
>
> > '[The master] would not fulfil his contract if he delivered [the goods] to anyone [other than someone producing the bill of lading] though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract.'

Whether the plaintiffs are entitled to damages has to be tried but the claim in rem has not been extinguished and I am satisfied that there has not been any material non-disclosure as alleged or at all.

What the shipowner has put up here are defences which have to be adjudicated elsewhere. If he succeeds in his contention that the cargo was released to the true owner who was entitled to such release when it was effected, no damages would be recoverable. However the warrant of arrest was properly issued and should not be discharged until the disposal of the claim which counsel informs me has been made in another jurisdiction. The application, encl 25, is dismissed with costs.

Application dismissed.

Reported by Anne Khoo